

1 LEROY SMITH, State Bar No. 107702  
County Counsel, County of Ventura  
2 ERIC WALTS, State Bar No. 233042  
Assistant County Counsel  
3 800 South Victoria Avenue, L/C #1830  
Ventura, California 93009  
4 Telephone: (805) 654-2585  
Facsimile: (805) 654-2185  
5 E-mail: eric.walts@ventura.org

JUL 28 2017

6 Attorneys for Respondent Ventura County  
Environmental Health Division, Solid Waste  
7 Local Enforcement Agency  
8

9 STATE OF CALIFORNIA

10 DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY  
11

12 In the Matter of:

13 Phillip Lee and Alice Lee,

14 Appellants,

15 v.

16 Ventura County Environmental Health  
Division, Solid Waste Local  
17 Enforcement Agency,

18 Respondent.  
19

} APPEAL OF VENTURA COUNTY  
LOCAL ENFORCEMENT AGENCY  
HEARING OFFICER DECISION,  
ISSUED MAY 15, 2017

} RESPONDENT'S OPENING WRITTEN  
ARGUMENTS

} Date: 8/4/2017

} Time: 1:00 p.m.

} Location: 1001 "I" Street, Room 2550  
Sacramento, California

20 I

21 INTRODUCTION

22 Appellants Phillip Lee and Alice Lee (collectively the "Lees") remain in violation  
23 of CalRecycle regulations governing the disposal or processing of construction and  
24 demolition debris despite the Local Enforcement Agency's ("LEA") best efforts for  
25 almost a year to explain the violations to the Lees and offer them compliance assistance.  
26 The Lees maintain that the large amount of demolition debris that they imported and  
27 deposited on their land is not "waste," and therefore is not subject to regulation as "solid  
28 waste," because *they* value it and *they* have not discarded it. What the Lees fail to

1 recognize is the: when the owners of the hardscape, swimming pools and other structures  
2 that were demolished discarded the resulting debris, it became “solid waste.” Therefore,  
3 if the Lees want to reuse or recycle that debris, they must do so in compliance with the  
4 regulations governing the disposal and processing of construction and demolition and  
5 inert debris.

## 6 II

### 7 STATEMENT OF FACTS

8 Some time between May 2015 and February 2016, Phillip Lee brought the material  
9 in question onto property owned by him and Alice Lee at 6501 Chagall Drive (the  
10 “property”) and piled it along the northern edge of the property to create a levee or berm.  
11 (Record of Proceedings of Hearing Officer’s Decision (“ROP”), pp. 64:6-8, 92-93, 190,  
12 227-233 & 270-271.) The material in question is approximately 600-700 cubic yards of  
13 1-4 foot pieces of debris (largely broken concrete with bricks and various masonry  
14 articles) from demolition operations. (ROP, pp. 74:23-75:4, 87:11-15, 91:10-15, 92:3-4,  
15 113:10-14 [“you’re calling this ‘construction material,’ even though it’s — it’s obviously  
16 being . . . repurposed at this point. [¶] MR. LEE: That’s right.”]; 190, 228, 229, 231,  
17 250 & 251.)

18 No entitlements, permits or approvals were issued for this berm by the LEA, or any  
19 other agency. (ROP, pp. 60-61, 77:1-6, 78:16-20, 81:25 - 82:4, 87:16-24.) LEA officials  
20 discovered the berm in September 2015, during an inspection following a complaint.  
21 (ROP, p. 190.) Thereafter, the LEA staff repeatedly offered compliance assistance and  
22 gave the Lees ample opportunity to comply before issuing the Cease and Desist and  
23 Corrective Action Order (the “Order”). (ROP, pp. 80:6 - 82:4, 88:12 - 89:9, 94:10 - 95:2,  
24 190-193.)

25 On March 8, 2017, the LEA issued the Order. (ROP, pp. 265-268 (Exh. X).) The  
26 Lees requested a hearing on the grounds that the material at issue is not solid waste and  
27 objected to the hearing officer. (ROP, pp. 45-49, 58-59, 177-179 & 270-271.) The  
28 hearing officer overruled the objection and upheld the Order with extensions of its

1 compliance deadlines. (ROP, pp. 1-3.) The Lees appealed to the State of California,  
2 Department of Resources Recycling and Recovery (“CalRecycle”) on the same grounds  
3 raised below. (Appeal to CalRecycle dated May 31, 2017.)

4 **III**  
5 **ARGUMENT**

6 **A. Standard of Review**

7 CalRecycle may only overturn the Order if it finds, based on substantial evidence,  
8 that the Order was inconsistent with the California Integrated Waste Management Act of  
9 1989 (the “Act”). (Pub. Resources Code, § 45031, subd. (b).) The evidence before  
10 CalRecycle includes the record before the hearing officer and “any other relevant  
11 evidence that, in the judgment of [CalRecycle], should be considered to effectuate and  
12 implement the policies of [the Act].” (*Id.*, subd. (a).)

13 **B. The Hearing Officer Was Qualified**

14 The Lees object to the hearing officer on several grounds. (Appeal; see ROP,  
15 pp. 45-46.)

16 **1. The LEA Proceeded in Accordance with its EEP and the Act in Appointing**  
17 **the Hearing Officer**

18 The Lees contend that the hearing officer must be an administrative law judge  
19 (“ALJ”) pursuant to the LEA’s Enforcement Program Plan for Solid Waste (“EPP”) and  
20 request that this matter be referred to the Office of Administrative Hearings. (ROP,  
21 pp. 45, 46 & 177.) The Lees acknowledge that the EEP was updated on March 31, 2017,  
22 to provide:

23 “The hearing officer shall be selected by the Environmental  
24 Health Division [*sic*] for his/her legal, administrative, or  
25 technical abilities relating to solid waste management. The

26 ///

27 ///

28 ///

1 hearing Officer [*sic*] shall be independent of the Ventura  
2 County Environmental Health Division.” (ROP, p. 45.<sup>1/</sup>)  
3 However, the Lees contend that selection of the hearing officer must comply with the  
4 EPP in effect on March 8, 2017, when the LEA issued the Order, which provided that the  
5 hearing officer would be an ALJ. (ROP, p. 46; see ROP, pp. 177-178.)

6 First, there is simply no authority for the Lees’ proposed requirement as to when  
7 the LEA is required to update its EPP. To the contrary, “[t]he components of the EPP  
8 shall be reviewed and amended by the LEA annually or more frequently as determined by  
9 [CalRecycle] *to reflect* any changes.” (Cal. Code Regs., tit. 14, § 18081, subd. (e)(4),  
10 italics added.) Even if there were such a rule, the noncompliance the Lees allege would  
11 not warrant vacating the hearing officer’s decision or remanding to an ALJ. (See *Sierra*  
12 *Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236 “[o]nly if the manner in which  
13 an agency failed to follow the law is shown to be prejudicial, or is presumptively  
14 prejudicial, as when the department or the board fails to comply with mandatory  
15 procedures, must the decision be set aside”]; *North Pacifica LLC v. California Coastal*  
16 *Com’n* (2008) 166 Cal.App.4th 1416, 1431 “[u]nless the intent of a statute can only be  
17 served by demanding strict compliance with its terms, substantial compliance is the  
18 governing test”], 1433-1434.) Here, the hearing officer took no action until April 17,  
19 when she convened the hearing, well after the EPP was updated.

20 The Lees’ more fundamental mistake is they read the EPP as if it were a statute or  
21 regulation. The EPP is, as the name implies, a program manual. The intent of  
22 requirements to prepare, update and submit the EPP to CalRecycle is to facilitate  
23 CalRecycle’s oversight of the LEA enforcement program and its ongoing review of the  
24 LEA’s certification. (See Cal. Code Regs., tit. 14, § 18077.)

25 ///

---

27 <sup>1/</sup> The Lees’ quotation of the EPP varies slightly from the EPP, which provides:  
28 “the Hearing Officer shall be selected by the Environmental Health Division Director  
....” (EPP, Ch. 12, § IV, Background.)

1 The Lees also contend that “it does not appear that the County has complied with  
2 Public Resources Code section 44308(g) [*sic*] by adopting procedures for making  
3 that appointment and establishing the specific qualifications that the hearing officer is  
4 required to meet.” (ROP, p. 46; see Pub. Resources Code, § 44308, subd. (d).) But the  
5 County of Ventura (“County”) has done so. The County Board of Supervisors enacted an  
6 ordinance to implement the Act. (See Ventura County Ordinance Code, § 4700-1.<sup>2/</sup>) That  
7 ordinance provides that the hearing officer is the person designated by the Director of the  
8 Environmental Health Division and requires that the hearing officer not be “the  
9 investigating officer involved in the particular proceeding or such officer’s supervisor.”  
10 (*Id.*, § 4701-19.)

11 As noted above, under the EPP, the Director of the Environmental Health Division  
12 selects the hearing officer for “his/her legal, administrative, or technical abilities relating  
13 to solid waste management.” The Lees complain that the hearing officer does not possess  
14 “any particular abilities relating to solid waste management” but do not explain why the  
15 hearing officer needs such abilities to decide this matter or how the Lees could be  
16 prejudiced by the lack of such abilities.

## 17 **2. The Hearing Officer Was Impartial**

18 The County’s Resource Management Agency houses the Environmental Health  
19 Division (which acts as the LEA) and employs the hearing officer as the County Sealer of  
20 Weights and Measures. (See ROP, p. 54:1-7.) The Lees contends the hearing officer was  
21 not neutral because “[Resource Management Agency] representatives are serving as  
22 prosecutor and judge.” (ROP, p. 46.) However, as a matter of law, that circumstance is  
23 not sufficient to overcome the presumption that the hearing officer is impartial.

24 Absent a personal financial interest in the outcome, the decision maker is  
25 presumed to be impartial. To overcome this presumption the Lees “must demonstrate  
26

---

27 <sup>2/</sup> The VCOC is available at  
28 [https://www.municode.com/library/ca/ventura\\_county/codes/code\\_of\\_ordinances](https://www.municode.com/library/ca/ventura_county/codes/code_of_ordinances). The  
solid waste ordinance is located in division 4, chapter 7, section 4700 et seq.

1 actual bias or circumstances ‘in which experience teaches that the probability of actual  
2 bias on the part of the judge or decisionmaker [sic] is too high to be constitutionally  
3 tolerable.’” (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Education* (2013)  
4 57 Cal.4th 197, 219, citations omitted.) The failure by the agency to separate  
5 prosecutorial and adjudicatory functions may present a constitutionally intolerable risk of  
6 bias. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd.*  
7 (2009) 45 Cal.4th 731, 737 “[p]rocedural fairness . . . does require some internal  
8 separation between advocates and decision makers to preserve neutrality”].) In this  
9 context, separation of functions means that a single person does not advocate, or advise or  
10 supervise an advocate, and also decide the matter (or advise or supervise the person who  
11 decides). This separation includes a prohibition on off-the-record communications  
12 between the prosecution team and the adjudication team about the substance of the case.  
13 (*Id.* at p. 738; see *id.* at pp. 738-739 [applying rule of reason to separation of functions  
14 and ex parte communications]; see also Gov. Code, § 11425.30 [requiring that presiding  
15 officer has not “served as investigator, prosecutor, or advocate in the proceeding or its  
16 preadjudicative stage” and is not “subject to the authority, direction, or discretion of a  
17 person who has served as investigator, prosecutor, or advocate in the proceeding or its  
18 preadjudicative stage”].)

19 The fact that the hearing officer and the LEA officials are both employed by  
20 County Resource Management Agency is not evidence that the hearing officer acted in  
21 both a prosecutorial and adjudicatory capacity in this matter. It is not even evidence that  
22 the hearing officer has ever worked with or for the LEA in any capacity in any other  
23 matter. All indications are to the contrary. (See ROP, p. 53:10-15: “I have had . . .  
24 hearing officer training through both the California Department of Food and Ag. and  
25 Department of Pesticide Regulations . . . never done a solid waste hearing before”].)

26 **C. The Berm is a Disposal of Solid Waste**

27 There is no significant dispute on the essential facts: the Lees imported and piled  
28 approximately 600-700 cubic yards of concrete and other demolition debris on their

1 property to form a berm. (See § II Statement, p. 2, above.) With exceptions not relevant  
2 here “‘solid waste’ means all putrescible and nonputrescible solid, semisolid, and liquid  
3 wastes, including . . . demolition and construction wastes, . . and other discarded solid  
4 and semisolid wastes.” (Pub. Resources Code, § 40191, subd. (a).) Citing *Waste*  
5 *Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th  
6 478 (“*Waste Management*”), the Lees argue that the demolition debris is nevertheless not  
7 “waste” because it has “economic and useful value to them” and “[t]he Lees have not  
8 discarded” it. (ROP, pp. 46-47.)

9 But the Lees misread the *Waste Management* case. When the owners of the  
10 hardscape, swimming pools and other structures that were demolished discarded the  
11 resulting debris, by paying contractors to take it away, it became “solid waste.”  
12 Therefore, if the Lees want to reuse or recycle that debris, they must do so in compliance  
13 with the regulations governing the disposal and processing of that type of solid waste.

14 In *Waste Management*, a city awarded the plaintiff an exclusive franchise pursuant  
15 to the Act to collect “refuse” and “recyclables.” (*Waste Management, supra*, 7 Cal.4th at  
16 p. 482.) The plaintiff sued a competitor who paid large commercial customers within the  
17 city for certain recyclable materials alleging that the competitor was violating the  
18 plaintiff’s exclusive franchise rights by collecting recyclables. (*Id.* at p. 483.) The court  
19 held that sales of recyclable materials to the competitor were not subject to the franchise  
20 because “the Act authorizes exclusive franchises only for ‘solid waste handling’ [and] an  
21 item that is sold is not discarded and thus does not become ‘waste.’” (*Id.*, pp. 481-482.)

22 *Waste Management* does not stand for the proposition, as the Lees’ argument  
23 suggests, that if a subsequent owner values and uses a discarded material it is no longer  
24 waste. *Waste Management* addressed how a “material” enters the waste stream. “In  
25 short, if the owner of recyclable materials discards them into the solid waste stream, they  
26 become solid waste subject to the Act.” (*Waste Management, supra*, 7 Cal.4th at p. 489;  
27 see *id.*, p. 487 [“‘Since these materials were *never* thrown away as not immediately  
28 useful, they cannot be said to have constituted waste . . . ,” italics added]; *Pleasant Hill*

1 *Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 695-696,  
2 citing *Waste Management, supra* [holding when generators of construction and  
3 demolition debris paid to remove that material from job sites, that made the materials  
4 discarded “waste”].) The Act and implementing regulations, not the Lees’ intent, govern  
5 how solid waste leaves the waste stream.

6 As the hearing officer’s “extreme example” recognizes, the Lees’ interpretation  
7 proves too much. (See ROP, p. 3.) If Public Resources Code section 40191 meant that a  
8 solid waste becomes not a solid waste because a subsequent owner sells or values it, that  
9 would render much of the Act unenforceable, if not superfluous. The regulations  
10 germane to this case provide a more mundane example. The Lees’ argue the (previously  
11 discarded) demolition debris is not waste because they are using it as a berm or levee, not  
12 discarding it. But that is exactly what California Code of Regulations, title 14,  
13 section 17387 et seq. (“Construction and Demolition Waste and Inert Debris Disposal  
14 Regulatory Requirements”) regulates. Those regulations assume that the person  
15 disposing of the demolition waste or inert debris may have a use for it and establish  
16 various “regulatory tiers” for such uses with corresponding conditions and levels of LEA  
17 review. (See Cal. Code Regs., tit. 14, §§ 17388.1-17388.5.)

18 Finally, the Lees were charged with disposal of the construction and demolition  
19 waste by using it to construct a berm. (ROP, p. 266; see Pub. Resources Code, § 40192  
20 [defining “disposal”].) With respect to that activity, the regulatory definition provides:

21 “‘Construction and Demolition Waste’ or ‘C&D Waste’  
22 means the nonhazardous waste building materials, packaging  
23 *and rubble resulting from construction, remodeling, repair*  
24 *and demolition operations* on pavements, houses, commercial  
25 buildings and other structures.” (Cal. Code Regs., tit. 14,  
26 § 17388, subd. (c), italics added.)

27 That is exactly what the Lees berm is: rubble resulting from demolition operations.

28 ///



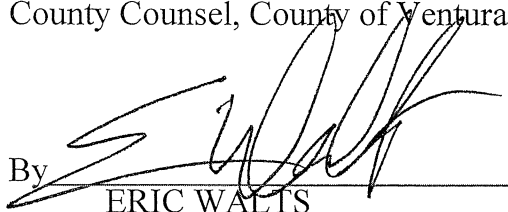
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IV  
CONCLUSION

For the foregoing reasons, the LEA requests that CalRecycle uphold its Order.

LEROY SMITH  
County Counsel, County of Ventura

Dated: 7/21/2017

By   
ERIC WALTS  
Assistant County Counsel

Attorneys for Respondent Ventura County  
Environmental Health Division,  
Solid Waste Local Enforcement Agency

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF VENTURA**

3 I am a resident of or employed in the County of Ventura, State of California. I am  
4 over the age of 18 and not a party to the within action. I am employed by the County of  
5 Ventura (County) and my business address is County Counsel's Office, 800 South  
6 Victoria Avenue, L/C #1830, Ventura, California 93009.

7 On July 21, 2017, I served the within RESPONDENT'S OPENING WRITTEN  
8 ARGUMENTS on:

9 Christina Vanarelli  
10 Christina Vanarelli, Inc.  
11 A Professional Law Corporation  
12 674 County Square Drive, Suite 209C  
13 Ventura, CA 93003-0449  
14 christina@yourventuracountylawyer.com

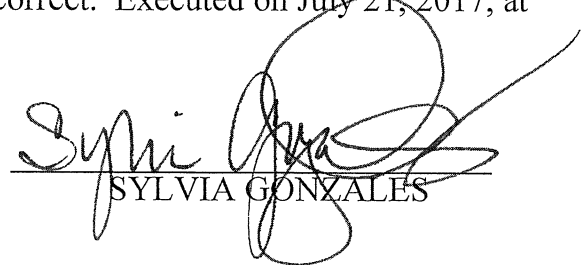
15 Scott Smithline  
16 Director, CalRecycle  
17 1001 "T" Street  
18 Sacramento, CA 95814

19 Douglas Jensen  
20 Via electronic delivery only: douglas.jensen@calrecycle.ca.gov

21 [X] **by standard County mail practice.** I enclosed a true copy of each of said  
22 documents in a sealed envelope addressed to the above-named person(s) as  
23 indicated above, and placed the envelope for collection and mailing following  
24 ordinary business practices. I am readily familiar with this business's practice for  
25 collecting and processing correspondence for mailing with the United States Postal  
26 Service. On the same day that correspondence is placed for collection and mailing,  
27 it is deposited in the ordinary course of business with the United States Postal  
28 Service with postage fully paid.

[X] **by electronic service.** Based on a court order, a court rule or an agreement of the  
parties to accept electronic service, I electronically served said documents from to  
the above-named person(s) at the electronic address(es) as indicated above at  
[time].

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of  
California that the foregoing is true and correct. Executed on July 21, 2017, at  
Ventura, California.

26  
27  
28  
  
SYLVIA GONZALES